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EX PARTE OR LATE FILED

April 30, 1997

EX PARTE

BY HAND
William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: CC Docket No. 96-45 -- In the Matter of Federal-State Joint Board on Universal Service

Dear Mr. Caton:

On April 30, 1997, on behalf of America Online, Inc. ("AOL"), a copy of the attached document was provided to Chairman Hundt; Commissioner Ness; Commissioner Quello; Commissioner Chong; Blair Levin; Thomas Boasberg, John Nakahata; James Casserly; James Coltharp; Daniel Gonzalez; Joseph Farrell; Regina Keeney; Kathleen Levitz; Tim Peterson; Mindy Ginsburg; Robert Pepper; A. Richard Metzger, Jr.; Kathy Franco; James Schlichting; Jane Jackson; Larry Atlas; Richard Welch; William Kennard; Mary Beth Murphy; and Laurence N. Bourne.

Pursuant to Section 1.1206(a)(1) of the Commission's Rules, two copies of this Notice are attached for inclusion in the public record in the above-captioned proceedings.

Should you have any questions regarding this matter, please contact me.

Sincerely,

Donna N. Lampert

Attachments

cc: Chairman Hundt
Commissioner Ness
Commissioner Quello
Commissioner Chong
Blair Levin
Thomas Boasberg
John Nakahata
James Casserly
James Coltharp
Daniel Gonzalez
Joseph Farrell
Regina Keeney
Kathleen Levitz
Tim Peterson
Mindy Ginsburg
Robert Pepper
A. Richard Metzger, Jr.
Kathy Franco
James Schlichting
Jane Jackson
Larry Atlas
Richard Welch
William Kennard
Mary Beth Murphy
Laurence N. Bourne

Ex Parte Presentation of America Online, Inc.
CC Docket 96-45

INTERNET SERVICE PROVIDERS ARE ELIGIBLE PROVIDERS OF BROADBAND ACCESS TO SCHOOLS AND LIBRARIES UNDER SECTION 254(h)(2)

The Statute is Designed to Maximize Choice for Schools and Libraries The FCC should ensure, pursuant to the statutory authority provided under Section 254(h)(2)[1/] of the Communications Act, that schools and libraries can choose from among the widest possible array of providers of access to advanced telecommunications and information services, including providers who are not "telecommunications carriers," such as independent Internet Service Providers ("ISPs")[2/].

Section 254(h)(2) Requires Competitively Neutral Rules Section 254(h)(2) directs the FCC to establish "competitively neutral rules to enhance . . . access to advanced telecommunications and information services" for schools, libraries, and health care providers. Consistent with the mandate for competitive neutrality, eligibility for universal service support made available pursuant to Section 254(h)(2) is not limited to telecommunications carriers. With the adoption of Section 254(h)(2), Congress recognized that the most efficient provider of access to advanced services may not be a telecommunications carrier. Thus, as the Federal-State Joint Board correctly concluded, Section 254(h)(2)'s mandate of competitively neutrality ensures that any entity can compete to provide access to schools and libraries, regardless of whether it is a telecommunications carrier.[3/]

The Statute Requires Only "Telecommunications Carriers" Contribute Section 254(d) requires that "every telecommunications carrier" that provides interstate telecommunications services contribute to universal service funding.[4/] Because Internet access services are not telecommunications services, revenues from those services cannot be used to determine an entity's universal service contribution. Significantly, unlike Section 254(h)(2), Section 254(d) does not require "competitive neutrality" such that would require all recipients of funding to contribute to universal service. Instead, Congress inserted its direction for competitive neutrality only in the subsection to which it intended it be applicable – the provision of "advanced services." Had Congress intended for there to be "competitive neutrality" in the contribution requirement, it could have and would have specifically so provided by express language in Section 254(d).

Internet Access Is Not A Telecommunications Service Internet access and on-line services are not telecommunications services. "Information services" and "enhanced services" provided over the facilities of common carriers have long been treated as separate and distinct from the basic

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1/ 47 U.S.C. § 254(h)(2).

2/ See Recommended Decision of the Federal-State Joint Board, CC Docket 96-45, at ¶ 465, citing, Joint Explanatory Statement, S.Conf. Rep. No. 104-230, 104th Cong., 2d Session at 132-133 (1996).

3/ Recommended Decision, CC Docket 96-45, at ¶¶ 462-463.

4/ 47 U.S.C. § 254(d). Section 254(b)(4) similarly refers to "providers of telecommunications services."

telecommunications capacity used to transmit those services.[5/] Reclassifying Internet access services as "telecommunications" would be contrary to the 1996 Act and the past treatment of Internet access and on-line services, and would represent an abrupt departure from the historically unregulated nature of these services. The 1996 Act establishes specific definitions for information services and telecommunications,[6/] based on the terms used in the Modification of Final Judgment ("MFJ").[7/] These services were considered information services under the MFJ because they included the capabilities for storing and retrieving information. Significantly, the dichotomy between telecommunications and information services embodied in the MFJ and the 1996 Act parallels the distinction between "basic" and "enhanced" services[8/] articulated in the FCC's Computer II proceeding.[9/] To the extent a person provides enhanced or information services, that

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5/ Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384 (1980) ("Computer II Final Order") (subsequent history omitted). A common carrier's basic transmission capacity is a telecommunications services that must be made available to any information service providers under tariff. Independent Data Communications Mfrs. Assoc., DA 95-2190 (rel. Oct. 18, 1995) ("Frame Relay Order,"), at ¶¶ 13, 59, citing Computer II Final Order, 77 FCC 2d at 475. A common carrier's Internet access service is not a telecommunications service, however. See, e.g., Bell Atlantic offer of Comparably Efficient Interconnection to Providers of Internet Access Services, CCBPol 96-09, DA 96-981 (rel. June 6, 1996) at ¶ 2.

6/ "Information services" means "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of such capability for the management, control, operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(20). By contrast, "telecommunications" means "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." Id. § 153(43). "Telecommunications service" is the offering of telecommunications for a fee directly to the public; a "telecommunications carriers" is any provider of telecommunications services. Id. § 153(46), (44).

7/ U.S. West v. Western Electric Co., Inc., 552 F.Supp. 131 (D.D.C. 1982) (subsequent history omitted). See H.R. Rep. No. 204, Part 1, 104th Cong., 1st Sess. 125 (1995) ("Information service" and "telecommunications" are defined based on the definition [sic] used in the Modification of Final Judgment"); cf. MFJ, § IV(J), (O). In the House-Senate conference on the 1995 Act, the Senate receded to the House on the definition of information service. The House receded to the Senate on the definition of telecommunications, but the House and Senate bills contained similar definitions of this term. H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 116 (1996).

8/ The Commission defined basic services as "pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information." Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384, 420 (1980) ("Computer II Final Order") (subsequent history omitted). Enhanced services are "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." 47 C.F.R. § 64.702(a).

9/ See U.S. v. Western Electric Co., Inc., 552 F. Supp. 131, 178 n. 198 (D.D.C. 1982) (subsequently history omitted) ("enhanced services' . . . are essentially the equivalent of the "information services" described in the proposed decree"). Accord Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, FCC 96-489 (rel. Dec. 24, 1996) at ¶ 102 ("all of the services that the Commission has previously considered to be 'enhanced services' are 'information

person is not a telecommunications carrier.[10/] The 1996 Act does not disturb this traditional conduit/content or basic/enhanced distinction; to the contrary, by borrowing the telecommunications/information services distinction from the MFJ, the 1996 Act codifies that distinction. Thus, providers of information services are not "telecommunications carriers" or "providers of telecommunications services." Such entities are therefore not obligated to contribute to the maintenance of universal services; nor are they subject to common carrier regulation applicable to telecommunications carriers.

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(continued)

services'"). The Commission has suggested that the term "information services" is broader than "enhanced services."

10/ See e.g., Amendment of the Communication's Rules and Regulations (Third Computer Inquiry), Phase II, 2 FCC Rcd 3072, 3080 (1987) ("Computer III Phase II Order").